Health and guardianship law

Editor: Dr Malcolm Smith

GUARDIANSHIP AND ADMINISTRATION APPLICATION IN THE MATTER OF MDC [2014] QCAT 338

The recent decision of the Queensland Civil and Administrative Tribunal (QCAT) in *Guardianship and administration application in the matter of MDC* [2014] QCAT 338, provides an important ruling on the limits of who can be appointed as an enduring power of attorney under the *Powers of Attorney Act 1998* (Qld). In particular, the tribunal adopted a broad interpretation of the term "health provider" when considering the limits on who can be appointed as an enduring power of attorney under the legislation.

THE FACTUAL BACKGROUND

The decision concerned a 73-year-old man, MDC, who was diagnosed with Alzheimer's Disease in 2011 and living in a residential aged care facility at the time of the application to the tribunal. MDC had three children with his wife, LC, who died in 1991. In 1994, MDC married BSC, a Thai national. MDC and BSC married in Thailand, but never registered their marriage in Australia. On 24 April 2013 MDC appointed his son, MJC, and his son's wife, LGC, as enduring power of attorneys. As MDC's cognitive functioning deteriorated over time, it was determined that his capacity to make personal and financial decisions was impaired. This required a consideration of the appropriate decision-making processes for MDC.

MDC's partner, BSC, made an application to the tribunal contending the appointment of MJC and LGC as attorneys, based upon the assertion that MDC lacked decision-making capacity in 2013 (at the time he sought to appoint to MJC and LGC as attorneys). BSC asserted that the Adult Guardian should be appointed to make personal decisions for MDC and that the Public Trustee should be appointed as his administrator. This was based on the argument that MJC and LGC were not eligible for appointment as attorneys as they fall within the definition of "health provider" under the legislative framework, and that they were not making decisions appropriately and in accordance with MDC's best interests. MJC also filed an application arguing that the appointment of him and his wife as enduring power of attorneys was valid, but even if this were not the case, he and his wife were the most appropriate appointments as guardians and administrators. This view was supported by an additional application to the tribunal that was made by a number of other relatives of MDC.

THE RELEVANT ISSUES FOR THE TRIBUNAL

To determine whether there was a need for a guardian, the tribunal was required to examine s 12(1) of the *Guardianship and Administration Act 2000* (Qld). This section stipulates that the tribunal must be satisfied, before appointing a guardian or an administrator, that the adult has impaired capacity for personal or financial matters and that the adult's interests will not be met unless such an appointment is made. Although the legislative scheme imposes a presumption in favour of capacity,[1] the tribunal determined that MDC's dementia was at an advanced stage rendering him incapable of understanding the nature and effect of personal or financial decisions and therefore leaving him unable to make decisions freely and voluntarily.[2] It was for this reason that the tribunal held that the presumption of capacity was rebutted (at [16]).

WAS THERE A NEED TO APPOINT A GUARDIAN AND ADMINISTRATOR?

Based on evidence provided by family members, the tribunal established that MDC had become settled whilst living in the aged care facility. Due to his ongoing health conditions and the need for

[1] See *Guardianship and Administration Act 2000* (Qld), Sch 1.

[2] According to the legislative scheme, "capacity, for a person for a matter, means the person is capable of – (a) understanding the nature and effect of decisions about the matter; and (b) freely and voluntarily making decisions about the matter; and (c) communicating the decision in some way": see eg, *Guardianship and Administration Act 2000* (Qld), Sch 4.

management of his income and assets, decisions needed to be made on his behalf. As s 12(1) of the *Guardianship and Administration Act 2000* (Qld) required the tribunal to establish whether MDC's needs would not be met without the appointment of a guardian or administrator, the tribunal had to consider whether the enduring documents were validly executed by MDC. Thus, if the attorneys were appointed in accordance with the terms of the *Powers of Attorney Act 1998* (Qld), MJC and LGC would have been regarded as MDC's decision-makers[3] (subject to an assessment of whether they were making decisions in accordance with MDC's best interests). Based on evidence provided by MDC's family members and the solicitor who drew up the documentation for the appointment of the enduring power of attorneys, there was some dispute as to whether MDC had the requisite capacity at the time of the appointment. Significantly however, the tribunal determined that MJC and LGC were not eligible for appointment as enduring power of attorneys.

According to s 29(1)(a)(ii) of the *Powers of Attorney Act 1998* (Qld) a "health provider" is not eligible to be appointed as the principal's enduring power of attorney. The definition provided in Sch 3 of the Act states that a health provider is "a person who provides health care in the practice of a profession or the ordinary course of business". The tribunal observed that MJC worked as a general practitioner (GP) in a medical practice with MDC's GP, Dr W. Despite the fact that Dr W was regarded as MDC's GP, it was determined that MJC was effectively a service provider for MDC's health needs: "MJC was not just '*kept in the loop*' regarding his father's treatment but was part of the team providing medical care" (at [27]). Moreover, it was observed that whilst "it was professionally appropriate to have a non-family member in the main role as general practitioner for MDC the legislation in my view is not contemplating the health provider must be paid to be ineligible to be appointed attorney" (at [29]).

Additionally, the fact that LGC was working as the practice manager with MJC and Dr W, was also relevant to determining the meaning of "health provider" under the legislation. Thus, it was noted that the "definition is sufficiently broad to also exclude LGC as an eligible attorney" and whilst "she is not a medical practitioner it is part of the 'ordinary course of business' for the surgery to provide health care to MDC and as practice manager, LGC could find herself in conflict with her workplace duties and her duties as attorney" (at [30]). It was therefore determined that the purpose of excluding certain people from being appointed as an enduring power of attorney, is to avoid conflict between those involved in providing the individual's health services and those responsible for making decisions for, and on behalf of, the relevant adult. It was for these reasons that the tribunal determined that there was a need to appoint a guardian and an administrator for MDC.

APPOINTING APPROPRIATE DECISION-MAKERS ON BEHALF OF MDC

As s 14(1) of the *Guardianship and Administration Act 2000* (Qld) also precludes a "health provider" from being appointed as a guardian or administrator, MJC indicated that he was willing to arrange for a different health provider (in a different medical practice) to take responsibility for MDC as his general practitioner, should that permit him to act as MDC's decision-maker. However, despite the fact that the Sch 1 of the legislation requires consideration of the principal's previously expressed wishes (which in this case, were for MJD and LGC to make decisions on his behalf), the tribunal expressed some concern in appointing MJC and LGC as guardians/administrators, based on the enmity between the couple and BSC. The tribunal considered the relevant history in relation to the family relationships and the management of MDC's financial affairs, particularly in relation to the need for an investigation following allegations that there were regular transfers of significant funds to BSC in Thailand. For these reasons, the tribunal appointed the Adult Guardian to make personal decisions for MDC and the Public Trustee as MDC's administrator.

COMMENT

This decision provides an interpretation of the meaning of "health provider", as relevant to the statutory guardianship regime in Queensland. The decision highlights the need to carefully consider the relevance of s 12(1) when appointing an enduring power of attorney, to ensure that prospective

[3] See *Guardianship and Administration Act 2000* (Qld) s 66, for the order of priority of substitute decision-makers.

attorneys are not involved in the management of the adult's health care, even informally. Although such a wide interpretation may appear capable of causing problems in some circumstances – such as those where family members are involved in *assisting* with the provision of an adult's health care – it should be remembered that the reason underpinning this interpretation, was to avoid conflict between those involved with *managing* an adult's health care, and those responsible for making decisions for, and on behalf of, an adult.

Dr Malcolm Smith